U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of

CURTIS THORNTON, et al.,
Complainants

v.

GARDENHOUR ORCHARDS, INC.,
Respondent

DATE ISSUED AUG 11 1986

Case No. 86-JSA-7

ETA No. 24-84-13

Counsel:

Keith G. Talbot, Esq.
For the Complainants

S. Steven Karalekas, Esq.
For the Respondent

BEFORE: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. §49 et seq., and the regulations governing the Job Service System found at C.F.R. Part 658. This decision is rendered on the basis of the written record in accordance with 20 C.F.R. §658.424(b).

On May 20, 1986, concurrent with the submission of briefs, the Complainants filed a Motion for Additional Evidence to be included in the Record. Since the additional exhibits are supporting documentation for the Complainants' legal arguments, they are admitted into the record.[1] See 20 C.F.R. §658.424(b).

---

[1] For purposes of identification, the additional evidence is marked as Complainants' Exhibits as follows:

1. 1984 Agricultural Clearance Order of Gardenhour;

2. Determination of the Maryland Department of Employment and Training in

Subsequently, on June 10, 1986, the Complainants filed a motion to Strike sections of the Respondent's brief, stating that the Respondent's brief was without basis in the administrative record. Specifically, the Complainants stated that the Respondent cited evidence in another Federal trial which was not evidence in this case. The brief is merely argumentative; it is not considered evidentiary. Moreover, in order for the brief to be persuasive, it must be supported by the evidence in the record. Accordingly, the Complainants' Motion to Strike is denied.

STATEMENT OF THE CASE

The Complainants, migrant farm workers, applied for fruit harvesting employment with the Respondent on September 15, 1983. The Respondent offered the Complainants jobs, however, informed them that housing was unavailable. Despite the unavailability of housing that day, seven of the Complainants accepted jobs to begin on September 19, 1983.

The Complainants asserted that the Respondent did not at any time offer them housing because he was reserving it for for temporary foreign workers from Jamaica. The Respondent claimed that he initially did not offer housing to the Complainants since he believed them to be local commuters. He stated that upon learning that the Complainants were migrant farm workers, he advised them that his housing would not be available until September 19, 1983, due to repairs necessitated by vandalism.

On September 19, 1983, the Complainants filed a Job Service complaint with the Maryland Employment Security Administration alleging violations of 20 C.F.R. §655.202(b)(l), the requirement for provision of housing to U.S. job applicants when housing has been offered to temporary foreign workers.

By letter of Samuel Pruett, dated September 26, 1983, the Hagerstown Employment Service Office adopted the position of the Respondent and found that his failure to offer housing was not a violation of 20 C.F.R. §655.202(b)(l). The Complainants appealed this decision to the Director, Maryland Department of Employment and Training on October 4, 1983. On December 2, 1983, the Director affirmed the decision of the Hagerstown Office adding that the Respondent offered to pay commuting expenses until the housing was available.

Jackson v. Gardenhour Orchards, Inc., MD Job Service Complaint No. 4630-83-70;

3. Determination of the Regional Administrator of the U.S. Department of Labor in Jackson, at 4630-83-70;

4. Decision and Order of Administrative Law Judge in Jackson, 86-JSA-1.

On December 13, 1983, the Complainants appealed the Director's decision. Thereafter, on September 18, 1984, Special Examiner Martin A. Ferris conducted a hearing at which the Respondent was not present. The Special Examiner reversed the decision of the Director, stating that the evidence indicated that the Respondent refused to provide housing to the Complainants since it was being reserved for temporary foreign workers who were en route to the Respondent's premises. The Special Examiner ordered all Job Services to the Respondent to be terminated within twenty working days of the receipt of the decision. Pursuant to 20 C.F.R. §658.418, on December 12, 1984, the Respondent appealed the decision of the Special Examiner to the Regional Administrator, Employment and Training Administration, U.S. Department of Labor (RA). On January 17, 1986, the RA affirmed the decision of the Special Examiner and ordered the Respondent ineligible to apply for a temporary labor certification in the coming year.

This is an appeal of the RA's decision that the Respondent had violated the assurances contained in its application for temporary foreign labor certification by failing to offer the Complainants housing.

DISCUSSION AND CONCLUSION

So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, the regulations require that an employer must offer U.S. workers the same benefits which he is offering to temporary foreign workers. Accordingly, every employer of temporary foreign workers must provide housing without charge to every U.S. worker. 20 C.F.R. §655.202(b)(l).

The Respondent asserted that there were legitimate reasons for his initial failure to offer housing to the Complainants on September 15, 1983. Nevertheless, the RA adopted the Complainants' position finding that the evidence was contrary to the Respondent's assertions regarding the availability of housing beginning September 19, 1983. In particular, the RA observed that none of the Complainants who reported for work on September 19 or 20, 1983 ever moved into the housing. Accordingly, the RA found the Respondent to be in violation of the assurance of housing to workers his Clearance Order for temporary labor certification.

The Respondent has provided no evidence other than his affidavit and deposition testimony to support his position. His assertion that the Complainants' did not raise their allegation that the housing was being reserved for temporary foreign workers until the hearing before the Special Examiner is without merit. In a September 19, 1983 letter by Counsel for the Complainants to the Hagerstown Office, Counsel writes, "Mr. Gardenhour stated that he did not have his own labor camp, but instead utilized a portion of another grower's labor camp and therefore, could put only temporary foreign workers there."

In the present case, the Complainants should have been offered housing no later than September 19, 1983, the date the Respondent claimed the housing would be habitable. The testimony from the Complainants and the Respondent indicates that none of the Complainants ever occupied the housing. Furthermore, the testimony of the Complainants indicates their desire to occupy the Respondent's housing. The contradictory testimony is

regarding the cause of the unavailability of the housing. The RA concluded that if the Respondent's reason for the unavailability of the housing had been accurate, then the Complainants would have occupied the housing on the date on which the repairs would have been completed-September 19, 1983. Neither the Respondent's affidavit nor his testimony provides any legitimate basis for the failure of the Complainants to occupy the housing as of September 19. 1986. The evidence clearly supports the RA's conclusion that the housing was being reserved for foreign workers and it is affirmed. Accordingly, I affirm the RA's decision to uphold the Special Examiner's termination of all Job Services services to the Respondent.

In determining to impose the ineligibility sanction against the Respondent, the RA considered whether there had been a demonstrated adverse effect on U.S. workers, bad faith on the part of the Respondent or a pattern of violations. He found that the adverse effect on U.S. workers was based on the Respondent's failure to provide housing to U.S. workers, he found that the bad faith of the Respondent was demonstrated by his reservation of the housing for temporary foreign workers, and he found pattern of violations, citing the Jackson case. The testimony of the Complainants and the documents relating to the Jackson case support the RA's imposition of the sanction. Moreover, the Respondent's evidence does not support any basis for a finding that the sanction is inappropriate. Therefore, the RA's imposition of the ineligibility sanction is affirmed.

ORDER

The State of Maryland shall terminate all Job Service services to Gardenhour Orchards, Inc., in accordance with 20 C.F.R. §658.502(a)(3) until reinstatement of services is deemed appropriate pursuant to §658.504.

Gardenhour Orchards is hereby ordered ineligible to apply for a temporary labor certification in the coming year.

CHARLES P. RIPPEY
Administrative Law Judge

Washington, D.C.
CPR:WLS 1 34-9